Supreme Court, U.S.
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No. 02-986

In The

Supreme Court of the United States

Darrell D. Smith, Patrick M. Smith
John McBride, and John and Jane Doe,
PETITIONERS,

vs.

STATE OF OREGON,
RESPONDENT.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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SUPPLEMENTAL APPENDIX

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Patrick M. Smith
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Petitioners Pro-Per

December 18, 2002

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10 pp

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DARRELL D. SMITH; PATRICK M. SMITH; JOHN McBRIDE; and JOHN and JANE DOE,	)	CV-00-1687-ST
Plaintiffs,	)	ORDER
v.	)	
STATE OF OREGON,	)	
Defendant.	)	

STEWART, Magistrate Judge:

On june 8, 1999, plaintiffs Darrell D. Smith, Patrick M. Smith, John McBride, and John and Jane Doe, filed this action in the United States District Court for the District of Columbia, *Smith, et al. v. State of Oregon*, Civil No. 99-1490-LFO. In this case, plaintiffs seek declaratory relief that Measure 362-363, approved by the voters of the State of Oregon on November 8, 1999, was not validly adopted and may not properly be made part of the Oregon Constitution. The sole named defendant is the State of Oregon.

On December 12, 2000, after defendant filed a motion to dismiss, plaintiffs filed an Amended Complaint (docket #11). Although plaintiffs filed a Motion for Leave to Amend and perfect the Complaint on September 7, 1999 (docket #5), that motion was

never ruled on. Because the Amended Complaint does not appear to differ substantively from the original Complaint, the Motion for Leave to Amend (docket #5) is granted.

DATED this 15th day of December 2000.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

APENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DARRELL D. SMITH; PATRICK M. SMITH; JOHN McBRIDE; and JOHN and JANE DOE,	)	CV-00-1687-ST
Plaintiffs,	)	FINDINGS AND RECOMMEND-
v.	)	ATIONS
STATE OF OREGON,	)	
Defendant.	)	

STEWART, Magistrate Judge:

INTRODUCTION

On June 8, 1999, plaintiffs Darrell D. Smith, Patrick M. Smith, John McBride, and John and Jane Doe, filed this action in the United States District Court for the District of Columbia, *Smith, et al. v. State of Oregon*, Civil No. 99-1490-LFO. In this case, plaintiffs seek declaratory relief that Measure 362-363, approved by the voters of the State of Oregon on November 8, 1999, was not validly adopted and may not properly be made part of the Oregon Constitution. Specifically, plaintiffs seek declarations that Measure 362-363 violates Article IV, VII, XVII of the Oregon Constitution. The sole named defendant is the State of Oregon.

On August 24, 1999, defendant filed a motion to dismiss this case for insufficient service under FRCP 12(b)(5), to transfer the action to the United States District Court for the District of Oregon for improper venue under FRCP 12(b)(3), to dismiss the case for lack of subject matter jurisdiction under FRCP 12(b)(1), and to dismiss the case for failure to state a claim under FRCP 12(b)(6). On August 31, 1999, Clifford Scott Barker and Sarah Jane Price filed a "Joinder in the Action" apparently seeking to join this action as plaintiffs and seeking damages for the costs incurred in defending cases in the Union County Circuit Court for the State of Oregon and in the United State District Court for the District of Oregon.

On December 14, 1999, United States District Judge Louis F. Oberdorfer granted defendant's motion to dismiss in part and ordered the action transferred to this court. Judge Oberdorfer did not rule on the remaining issues in defendant's motion to dismiss and did not rule on the pending request for joinder.

On December 12, 2000, plaintiffs filed an Amended Complaint (docket #11), which this court has granted in the accompanying Order. For the reasons that follow, both the request for joinder and the motion to dismiss for lack of subject matter jurisdiction should be deemed as filed against the Amended Complaint, should be granted, and this action should be dismissed with prejudice.

MOTION TO JOIN

Under FRCP 20, "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, or in

the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Although their "Joinder to the Action" is somewhat vague, Clifford Scott Barker and Sarah Jane Price appear to seek joinder to collect damages for costs incurred defending actions against them which resulted from application of Measure 362-363. Their "Joinder to the Action" (docket #7) should be construed as a motion for joinder and be granted.

MOTION TO DISMISS

I. Legal Standard

A motion to dismiss under FRCP 12(b)(1) confronts the courts subject matter jurisdiction. Federal courts are courts of limited jurisdiction and a case is presumed to fall outside a federal courts jurisdiction unless proven otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 US 375, 377 (1994). Plaintiff bears the burden of proof that jurisdiction exists. *Thornhill Pub. Co. Inc. v. General Tel. & Electronics Corp.*, 594 F2d 730, 733 ((th Cir 1979) (citation omitted)

> [W]here a jurisdictional issue is separable from the merits of a case, the court may determine jurisdiction by the standards of Rule 12(b)(1) motion to dismiss for lack of jurisdiction. In such a situation, the district court is "free to hear evidence regarding jurisdiction and to rule on the issue prior to trial, resolving factual disputes where necessary."

Roberts v. Corrothers, 812 F2d 1173, 1177 (9th Cir 1987), quoting *Augustine v. United States*, 704 F2d 1074, 1o77 (9th Cir 1983) (internal quotation omitted). However, the question of jurisdiction is dependant on the resolution of factual issues going to the merits, a court may not resolve genuinely disputed facts. *Augustine*, 704 F2d at 1077.

II. Eleventh Amendment

The Eleventh Amendment to the United States Constitution prohibits suits in federal courts against a state, regardless of the nature of the relief sought, unless the stat unequivocally consents. *Pennhurst State Sch. & Hosp. V. Halderman*, 465 US 89, 100 (1984). This bars suits against states in federal courts not only by actions brought by citizens of another state, but also to those brought by citizens of the state involved. *See Dellmuth v. Muth*, 491 US 223, 229, n2 (1989), citing *Hans v. Louisiana*, 134 US 1 (1890) ("[A]n unconsenting State is immune from liability for damages in a suit brought in federal court by one of its own citizens.").

The Eleventh Amendment confirms that each state is a sovereign entity and that "'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Seminole Tribe of Florida v. Florida*, 517 US 44, 54 (1996), *quoting Hans*, 134 US at 13. Accordingly, the Supreme Court has long held that "[t]his express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent." *Ford Motor Co. v. Dept. of Treasury of Ind.*, 323 US 459, 464 (1945) (citations omitted). The Eleventh Amendment bars suits for damages in federal court

against a state or its agencies or its officials. *Pennhurst*, 456 US at 100 (citations omitted) It precludes suits in law and equity. *Patsy v. Board of regents of Fla.*, 457 US 496, 530 (1982) (citations omitted). Recent decisions by the Supreme Court have demonstrated the continuing vitality of the Eleventh Amendment bar. *See Kimel v. Florida Bd. Of Regents*, 528 US 62 (2000) (Age Discrimination in Employment Act does not validly aborgate a State's sovereign immunity); *Alden v, Maine*, 527 US 706, (1999) (barring individual suit against a State to enforce rights under the Fair Labor Standards Act).

Oregon has not consented to suit by explicitly waving its Eleventh Amendment immunity. *See Rounds v Oregon State Bd. of Higher Ed.*, 166 F3d 1032 (9th Cir 1999); *Quillin v. Oregon*, 127 F3d 1136 (9th Cir 1997). In their Complaint, plaintiffs name the State of Oregon as the only defendant. Although plaintiffs seek declaratory relief, the Eleventh Amendment clearly bars all claims against a State unless the State unequivocally consents. Plaintiffs have provided this court with no citation to any authority indicating that the State of Oregon has consented to suits of this nature. Therefore, the Eleventh Amendment bars plaintiffs' claims. For this reason, defendant's motion to dismiss for lack of subject matter jurisdiction should be granted, and this action dismissed with prejudice.

RECOMMENDATIONS

For the reasons set forth above, the "Joinder in Action" (docket #7) filed by Clifford Scott Barker and

Sarar-Jane Price should be construed as a motion for joinder and be granted. Defendant's Motion to Dismiss (docket#3) for lack of subject matter jurisdiction (part of docket #3) should be GRANTED. All other motions should be DENIED, and this case should be DISMISSED WITH PREJUDICE.

SCHEDULING ORDER

Objections to these Findings and Recommendations, if any, are due January 5, 2001. If no objections are filed, then the Findings and Recommendations will be referred to a district court judge and go under advisement on that date.

If objections are filed, t5he response is due no later than January 25, 2001. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will be referred to a district court judge and go under advisement.

DATED this 15th day of December 2000.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

No. _____

_____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

Darrell D. Smith, Patrick M. Smith,
John McBride, John and Jane Doe – PETITIONERS

vs.

STATE OF OREGON – RESPONDENT

PROOF OF SERVICE

I, Darrell D. Smith, Patrick M. Smith and John McBride, do declare that on this date, December 18, 2002, as required by the Supreme Court Rule 29 we have served the enclosed **SUPPLEMENTAL APPENDIX** on each party to the above proceeding or party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Hardy Myers
Attorney General for Oregon
400 Justice Building
Salem, Oregon 97310

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18, 2002.

Darrell D. Smith
Patrick M. Smith
John McBride